No. 2943.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

James B. Simpson, Indicted as James B. Miller,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

This case reaches this court upon a writ of error to the United States District Court for the Southern District of California, Southern Division, Honorable Oscar A. Trippett, judge.

The defendant, whose true name is James B. Simpson, but who, since his boyhood has more generally been known among his friends and business associates as James B. Miller, was indicted for an alleged violation of section 3 of the "Mann White Slave Act."

The indictment contains two counts, upon the first of which the defendant was found "not guilty," and upon the second of which the jury returned a verdict of "guilty, with recommendation for leniency." Reference herein made to the "INDICTMENT" will therefor be intended to apply only to the second count therein contained.

The defendant interposed a demurrer to the indictment, wherein he objected to its sufficiency upon the grounds that it failed to state facts sufficient to constitute an offense, and upon the further ground that it was not direct or certain as respects the particular circumstances of the offense charged, and that said circumstances were necessary to be alleged in order to constitute a complete offense.

The second count of the indictment charges that the defendant, on or about the 26th day of November, 1915:

> "Did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman, to-wit, one Vida White, alias Vida Rogers, whose full and true name, other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the city of San Francisco, state of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Company railroad, a common carrier, from the said city of San Francisco to the city of San Diego, California, and via automobile stage, a common carrier, from the city of San Diego, California, to the town of Tia Juana, Mexico, for a certain immoral purpose, to-wit, for the purpose of having said Vida White

alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse." [Tr. p. 7.]

The theory of the government as to how, or in what manner the defendant *"persuaded, induced and enticed"* Vida Rogers to go from San Francisco to Tia Juana was disclosed in the opening statement of the district attorney to the jury, wherein he stated that the defendant:

> "Sent a telegram to Vida White, asking that she come down to Tia Juana and take charge of the house that he had built there, and that he would split fifty-fifty with her; and that subsequently to that he wired her again, urging her to come immediately and take charge of the house; and that she did go from the city of San Francisco to the city of Tia Juana, in Mexico." [Tr. p. 35.]

In support of this statement, and in order to prove the necessary persuasion, inducement and enticement of Vida Rogers by the defendant (without proof of which essential element there can, of course, be no violation of section 3 of the act) the Government interrogated its first witness, one Louise Bordeau, concerning the contents of two certain telegrams, testified to by her, as having been received in the month of November, 1915, by Vida Rogers (the woman alleged to have been persuaded, etc.,) in the city of San Francisco, and exhibited by said Vida Rogers to the witness, at and in a certain house of prostitution in that city which was conducted by said Vida Rogers and in which, at that time the witness, Louise Bordeau was

leading a life of prostitution. Over the objection of the defendant that such testimony was incompetent, irrelevant and immaterial; that no foundation had been laid for the question, and that the answers of the witness as to the contents of the alleged telegrams shown to her by Vida Rogers would not be the best evidence and that the questions concerning the contents of the alleged telegrams called for a conclusion of the witness and hearsay testimony, the witness was permitted by the court to testify what the alleged *wording of the contents of the telegrams was as she remembered it.*

The witness testified in reference to the first telegram as follows:

> "Q. Now, will you kindly state the wording of the contents of the telegram as you remember it?
>
> A. It was about a house with a dance-hall, kitchen and bar and five rooms in connection. Looks like a good proposition. Will finance everything. Will split fifty-fifty." [Tr. p. 42.]

And in reference to the second telegram as follows:

> "Q. Do you recall at this time what that telegram said?
>
> A. Yes, sir.
>
> Q. What did that telegram say, as near as you can recall at this time?
>
> A. That everything ready. Leave Thursday or Friday, I believe it was.
>
> Q. Do you remember by whom it was signed?
>
> A. Jim." [Tr. p. 44.]

At the conclusion of the Government's case, upon motion of the defendant to strike all testimony concerning the contents of the telegrams from the record,

which motion was predicated upon the same grounds as the defendant's objection thereto at the time it was received, the court made its order striking from the record the evidence objected to.

The defendant contended, on his motion for a new trial, and now most earnestly maintains, that the evidence, which it is conceded, was erroneously admitted, was so highly prejudicial in its character, that in view of all the other evidence in the case, it is clear that by reason of its admission the jury was lead to convict the defendant by reason of passion, prejudice and the ineffaceable recollection of the stricken testimony still in their minds, and not upon the legal evidence introduced at the trial of the cause.

At the conclusion of the Government's case, the defendant moved the court to instruct the jury to find a verdict of not guilty, on the ground that there was not sufficient evidence to sustain a conviction for the offense charged. The court denied the motion and in presenting the record to this court for review, plaintiff in error unhesitatingly and most positively asserts, absolutely fearless of naught but a dogmatic contradiction, that the closest, most careful and scrutinizing reading of the entire record will fail to reveal any evidence whatsoever to establish any one of the essential elements of the offense defined in the statute and attempted to be charged in the indictment.

We will discuss the evidence at length in our argument hereafter presented.

The court instructed the jury, and in so doing gave several instructions diametrically opposed to those requested by the defendant, and plaintiff in error will

hereafter point out what we believe to be error of the trial court in this regard.

Following the return of the verdict of the jury motions were duly made for a new trial and in arrest of judgment, and denied and the defendant was sentenced by the judgment of the court to be imprisoned in the United States penitentiary at McNeil Island for a term of one year and one day and to pay a fine of one thousand dollars.

II.

Brief Outline of Specification of Errors Relied Upon by Plaintiff in Error and Argument.

FIRST: ERROR OF THE COURT IN OVERRULING THE DEMURRER OF THE DEFENDANT TO THE INDICTMENT.

A. The indictment does not state facts sufficient to constitute a punishable offense.

B. It is not direct or certain as respects the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

SECOND: ERROR OF THE COURT IN PERMITTING THE WITNESS LOUISE BORDEAU TO TESTIFY IN REFERENCE TO THE ALLEGED CONTENTS OF A TELEGRAM SHOWN TO HER BY VIDA ROGERS IN SAN FRANCISCO.

A. The evidence was erroneously admitted in the first instance.

B. The subsequent action of the court did not cure the error.

1. It was highly prejudicial and the only fact, matter or circumstance in the whole trial tending to establish the gravaman of the offense.

THIRD: ERROR OF THE COURT IN THE ADMISSION, OVER THE OBJECTION OF THE DEFENDANT, OF UNITED STATES EXHIBITS 1, 3 AND 4.

A. They were highly prejudicial.

B. They violated elementary rules of evidence.

FOURTH: ERROR OF THE COURT IN DENYING DEFENDANT'S MOTION FOR AN INSTRUCTED VERDICT.

A. No evidence to establish:

1. That the defendant persuaded, induced or enticed Vida Rogers to go from San Francisco to Tia Juana.

2. That the defendant intended that Vida Rogers would or should engage in any unlawful practice whatsoever in Tia Juana.

FIFTH: ERROR OF THE COURT IN RENDERING JUDGMENT AGAINST THE DEFENDANT.

A. The evidence introduced at the trial was not sufficient to justify the verdict of the jury, or the judgment of the court.

B. The evidence did not show or tend to show that the defendant had committed any offense set out or attempted to be set out in the indictment.

C. The evidence did not show, or tend to show, that the defendant did knowingly persuade, induce or entice Vida Rogers to go from one place to another in foreign commerce.

SIXTH: INSTRUCTIONS.

A Error of Court in instructing the jury as to the portion hereinafter set forth.

B. Error of court in refusing to instruct the jury as requested by defendant, and hereinafter complained of.

POINT ONE.

The Court Erred in Overruling the Demurrer of the Defendant to the Indictment.

Section 3 of the "Mann Act," under which this indictment is brought, reads as follows:

> "Sec. 3. (Inducing, etc., transportation of women for immoral purposes a felony—punishment.) That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be

carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court."

And the charging part of the second count of the indictment is as follows:

"That James B. Miller * * * on or about the 26th day of November, 1915, * * * did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman, to-wit, one Vida White, alias Vida Rogers, * * * to go from one place to another in foreign commerce, * * * for a certain immoral purpose, to-wit, for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse."

THE INDICTMENT FAILS TO CHARGE AN OFFENSE.

It will be noted that, to be unlawful, the persuasion, inducement or enticement mentioned in section 3, must be with the intent and purpose on the part of the person persuading, etc., that the woman shall engage in the practice of "prostitution," or "debauchery" or "any other immoral practice." So, in the indictment under discussion, if the Government had charged that the defendant had persuaded and induced Vida Rogers to go from San Francisco to Tia Juana for the purpose of

having her there engage in prostitution or debauchery, there could be no question as to its sufficiency.

But the indictment charges that the defendant's immoral purpose was, to-wit, "for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution," and it therefore follows that if this was not an immoral practice within the meaning of that term as used in the statute, the indictment fails to charge an offense. In other words, the purpose and intent on the part of a person charged to have the woman engage in any practice, however immoral or reprehensible, would not be unlawful, unless those acts intended by the defendant to be practiced by the woman were such as to constitute an immoral practice within the meaning of that term as used in the statute.

As said in the late case of U. S. v. Welsh, 220 Fed. 764:

> "It goes without saying that this statute should receive a construction which will make it efficient to accomplish its intended purpose, but it should not be so enlarged or extended by judicial interpretation as to take in transactions which, however reprehensible, cannot be reasonably regarded as within its aim and intent. The conduct of this defendant, which the verdict requires us to assume, in corrupting a school girl of 15, closely related to himself by blood and a member of his brother's family, was so treacherous and detestable as to class him with the meanest of criminals; but that gives no warrant for punishing him under the White Slave Traffic Act, unless his proven transgressions come fairly within its provisions."

Thus the court, in determining the sufficiency of the indictment is necessarily called upon to construe and define the meaning of the term "other immoral practice" as used in the statute. This term, being general, but preceded by special descriptive acts, must be limited to acts of the same sort or kind under the old rule of *ejusdem generis*. This rule is well settled.

In the California case of *Ex parte* Williams found in the 87 Pac. Rep., at page 565, the Appellate Court succinctly states the rule as follows:

> "The rule seems to be well established in the interpretation of statutes and clauses like the one under consideration that where general words follow particular ones, the former are construed as applicable to persons or things of the same kind, class or nature. The rule has been further stated as follows: 'Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the class embraces "other" persons or things, the word "other" will generally be read as "other such like," so that the persons or things therein comprised may be read as of the same kind, class or nature, with and not of a quality superior to, or different from those specifically enumerated.' 21 Am. & Eng. Ency. 1012."

In the above case the court was called upon to determine the meaning of the words "other representative of value" as used in the phrase "money, checks, credits, or other representative of value." It held that the term "other representative of value" must under the rule of *ejusdem generis* be narrowed to conform to the meaning of the specific terms "money, checks or

credits" and therefore that the words would not apply to merchandise or anything else except the equivalent of money, checks or credits.

In several decisions of the United States court reference has been made to the meaning of the term "other immoral purpose" and "other immoral practice" and the proposition that that term must be limited to include only a like purpose as prostitution or debauchery.

In the case of U. S. v. Bitty, 208 U. S. 543, the Supreme Court of the United States in reference to the words "any other immoral purpose" as used in the phrase "for the purpose of prostitution or for any other immoral purpose" said the following:

> "It may be admitted that, in accordance with the familiar rule of *ejusdem generis,* the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis's Sutherland, Stat. Constr. sec. 423, and authorities cited."

Also see case of

U. S. v. Flaspoller, 205 Fed. 1006.

From what has been said above it is readily seen, therefore, that the immoral purpose or immoral practice referred to by the words "other immoral purpose" and "other immoral practice" in the statute, must be a purpose or practice of the same general class or kind as the particular purpose or practice of prostitution and debauchery.

THE LANGUAGE OF THE STATUTE CONTEMPLATES PERSONAL SEXUAL DEBAUCHERY.

In the case of Suslak v. United States, 213 Fed. 913, a decision rendered by the Circuit Court of Appeals of the Ninth Circuit, and therefore the law of this circuit, this court rendered an important decision for the reason, among others, that it defined the meaning of the terms "prostitution" and "debauchery." In reference to the term "prostitution" the court approved the instruction of the trial court given to the jury in reference thereto, the pertinent portion thereof being as follows:

> "Prostitution, within the meaning of the law and the charge before you now, means that the woman is to offer her body to indiscriminate sexual intercourse with men, either for hire or without hire."

And in reference to the term "debauchery" this court approves the definition given in the Century Dictionary wherein it is defined as follows:

> "Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust."

And this court says on page 917 *that the term was intended to be used in the act in the sense of unlawful indulgence of lust.*

A further definition of the word "debauchery" is found in the case of Gillette v. United States, 236 Fed. Rep. 215, decided by the Circuit Court of Appeals of the Eighth Circuit on September 4, 1916. Circuit Judge

Carland on page 218 of the report, uses the following language:

> "The word 'debauchery' is a word of broad signification. It includes all kinds of excessive indulgence in sensual pleasures of any kind, such as gluttony and intemperance; *but the word is used in the statute with reference to immoral sexual relations.*"

The terms "prostitution" and "debauchery" necessarily imply personal debauchery and indulgence of a sexual nature, and every reported case that we have read where the charge was under section 3 of the act shows that it was a debauchery of the body.

See:

U. S. v. Paulson, 199 Fed. 423;
U. S. v. Flaspoller, 205 Fed. 1006;
U. S. v. Wilson, 58 L. E. 728, 232 U. S. 728;
U. S. v. Hoke, 57 L. E. 523;
U. S. v. Brand, 229 Fed. 847;
U. S. v. Welsch, 220 Fed. 764;
U. S. v. Johnson, 215 Fed. 679.

The purpose charged in this indictment is not that Vida Rogers would engage in the practice of prostitution or debauchery, but that the defendant merely had an intent to have Vida Rogers "manage a house of prostitution." This she could do, and still not engage in either personal prostitution or personal debauchery. It is quite possible, and from an investigation of the police records of our larger cities quite probable, that in those places where prostitution is and has been legalized, many women have acted as the Madam of a

house, without they themselves engaging in the practice. Again, Vida Rogers might have been a woman 65 or 70 years old and still run a house of prostitution with never a thought of she, herself, selling her own body for filthy lucre.

We respectfully submit that while the indictment charges a purpose and intent most immoral and loathsome, it does not charge that the defendant had for his purpose an intent that Vida Rogers would personally engage in prostitution or debauchery within the meaning of that term as used in the statute, and defined in accordance with the rule of *ejusdem generis*.

True, in the Athanasaw case, 227 U. S. 326, the Supreme Court held that if the conditions shown to exist were such as would "necessarily and eventually lead to a life of debauchery or a carnal nature relating to sexual intercouse between man and woman" a conviction would be sustained under the statute, but it is noteworthy that in that case the prosecution alleged the transportation and persuasion, etc., was for the purpose of "debauchery,"—a term used in the statute, and that the defendant purposed that the girl should "give herself up to debauchery."

But as we have said before, if the Government had charged a purpose named in the statute the indictment would have been sufficient. And this brings us to the uncertainties existing in this indictment.

We contend that to effectively charge an immoral purpose in the indictment on the part of the defendant, under section 3 of the act, it is necessary to allege directly that the defendant intended that the woman

engage in the practice of prostitution or debauchery, or in the event this is not alleged, to set forth the facts and circumstances showing that, and allege that the woman would be placed in such surroundings, conditions and environments as would necessarily and eventually lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman.

The reason for this is twofold, first, so that the court may see if, in law, the alleged facts constitute an "immoral practice" within the purview of the statute, and second, so that the defendant may be informed as to what he is charged and thus prepare himself to meet that charge.

Is it alleged in this indictment that Vida Rogers would, or that the defendant intended that she would, be lead into a life of prostitution or debauchery?

Does it follow from an allegation that the purpose of the defendant was that Vida Rogers should manage a house of prostitution that he intended that she would prostitute her own body?

If she did manage a house of prostitution and did not herself engage in the practice of personal sexual prostitution or personal sexual debauchery, can it be said that under the term "other immoral practice," defined according to the rule of *ejusdem generis,* that conduct was an immoral purpose within the purview of the statute?

The California Penal Code provides in reference to the certainty required in reference to the charge of a public offense as follows:

Sec. 950. "INDICTMENT OR INFORMATION, WHAT MUST CONTAIN. The indictment or information must contain:

1. The title of the action, specifying the name of court to which the same is presented, and the names of the parties;

2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

Sec. 952. "INDICTMENT MUST BE DIRECT AND CERTAIN. It must be direct and certain, as it regards:

1. The party charged;

2. The offense charged;

3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

The Supreme Court of the state of California in the case of People v. Eppinger, 105 Cal. 236, sets forth the degree of certainty required to meet an objection to sufficiency upon the ground that it is uncertain as follows:

"An indictment or information must contain matter which shows on its face that a crime has been committed by the accused. If the matters charged in the indictment or information are as consistent with the innocence of the accused as with his guilt the presumption of his innocence will overcome the accusation of his guilt and the accused is not to be subjected to a trial of the charge."

The above case is cited with approval in the case of People v. Earl, 19 App. 69.

In the case of People v. Robles, 117 Cal. 681, the court says:

> "As matter of evidence, inferences and presumptions of fact might be drawn by a jury from all the circumstances—clearly indicating defendant's guilt,—and be justified. But we are dealing with the question as a matter of law; we are testing the sufficiency of the pleading in the light of law, and under such circumstances may not be aided by presumptions and inferences. The indictment must charge a crime in words; inferences cannot be invoked to aid its sufficiency."
>
> "It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute, or its equivalent or by stating facts which show that such crime has been committed. In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged."
>
> People v. Terrill, 127 Cal. 99.

See also:

> People v. Carrol, 1 Cal. App. 2.
>
> "In no case can an indictment be aided by presumption."
>
> People v. Cleary, 1 Cal. App. 52.

Both the Carrol case and the Terrill case are cited with approval in People v. Allison, 25 Cal. App. 746.

The Supreme Court of the United States has enunciated and approved the same proposition:

> "It is an elementary principle of criminal plead-

ing that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars. The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

United States v. Cruikshank, 92 U. S. 542.

See also:

U. S. v. Simmons, 96 U. S. 360;
U. S. v. Carll, 105 U. S. 611;
U. S. v. Moore, 160 U. S. 40;
U. S. v. Hess, 124 U. S. 486;
U. S. v. McConaughy, 33 Fed. 168.

In conclusion on this point we again submit, first, that the indictment in this case fails to state facts sufficient to effectively charge a violation of section 3 for the reason that it does not charge that the defendant's purpose was to have Vida Rogers engage in the practice of prostitution or debauchery, and the purpose that is charged is not an immoral purpose within the meaning of the words "other immoral purpose" as construed and defined by the adjudicated cases, and second, that it fails to measure up to the rules and

doctrines laid down by every court in our land as a test for the sufficiency of the allegations attempted to be charged for the reason that it is not brought within the rule laid down in the Athanasaw case, which would require that it be alleged that the purpose was for debauchery and that the conditions were such that Vida Rogers would have been necessarily and naturally lead into a life of debauchery of a *carnal nature relating to sexual intercourse between man and woman.*

POINT TWO.

The Court Erred in Overruling the Objections of the Defendant to the Questions Propounded to the Witness, Louise Bordeau, in Reference to the Contents of Two Telegrams Shown to her in San Francisco by Vida Rogers, and Permitting the Witness to State from her Memory the Wording of the Alleged Contents of the Telegrams.

The evidence erroneously admitted is here set forth in full [Tr. pp. 36-44]:

> "Vida Rogers received two telegrams about the time she and I left San Francisco.
>
> Q. I will exhibit to you a telegram, which I will call United States Exhibit 1 for identification, and I will ask you if that is the wording of the telegram that you say that this woman received?
>
> Mr. Rush: Just a moment. I object to that question as incompetent, irrelevant and immaterial.
>
> The Court: I think the "wording," Mr. Moody —if that is the telegram—
>
> Mr. Moody: Your Honor, it is impossible to produce the typewritten telegram which is delivered to a woman, but the telegram which is

filed, and which can subsequently be proven to have been filed,—if this woman can testify that that is the same wording that she saw at that time, then it would be a sufficient connection of the telegram.

The Court: If you want to introduce a copy, you will have to show that you cannot produce the original.

Mr. Moody: This is the original; this is not a copy. This is the one which was filed for record, and which was sent, which was filed in San Diego. This is not a copy.

Mr. Rush: I want to add to my objection the further ground that it calls for hearsay.

The Court: Now, do you propose to prove that you cannot get the copy, or the original, whichever it may be designated?

Mr. Moody: I propose to show that the woman, Vida Rogers, is without the jurisdiction of this court.

The Court: And that she has got that telegram?

Mr. Moody: That is impossible for us to say. The last time we had any information about it, she had it. But she is now without the jurisdiction of the court, and the process of this court will not reach her.

The Court: You are going to prove that?

Mr. Moody: I will prove that by this witness.

The Court: I think you better prove that first, Mr. Moody.

Mr. Moody: Q. Do you know where Vida Rogers is at the present time?

A. I believe she in Tia Juana.

Q. When did you see her in Tia Juana last?

A. It was about in July, was the last time I was over there.

Q. And she was there at that time?

A. She was there at that time.

Q. Have you seen her since?

Mr. Rush: When was that?

Mr. Moody: In July of this year.

The Court: Q. July of this year you are speaking about?

A. Yes.

Mr. Moody: Q. Have you seen her since?

A. No, I have not.

Q. Have you seen her in the United States since last November?

A. Oh, yes, sir.

Q. When was the last time you saw her in the United States?

A. Well, it was some time right after the floods; I don't remember just when.

Q. The last January floods?

A. Yes.

Q. And since that time you have not seen her in the United States?

A. No.

Mr. Moody: Now, if the court desires at this time any further evidence on the whereabouts of the woman, Vida Rogers, I can produce such testimony and withdraw this witness.

The Court: Well, I will not require you to withdraw her. Upon your representation that you expect to do it, I will permit the evidence, and I will strike it out if you fail to produce the evidence.

Mr. Rush: Your Honor, before Your Honor rules will you permit me to just suggest one matter, and that is this: I do it because I don't think

Your Honor apprehends the point of my objection. Before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown a telegram was sent, and before it can be proven that the telegram was sent, it must be proven it was sent by this defendant. So to show this woman a writing, or what purports to be a copy—not the thing that she saw there, but something containing the same language that she saw there— and ask her to refresh her memory from that, and say that that is the same language that was in the telegram that she saw in San Francisco, in any event would not be competent. She can only refresh her recollection from memoranda that she made herself. She cannot refresh her recollection from memoranda made by someone else, and which she, herself, did not see made, and never saw before this time. This, at the most, would be simply a memorandum of what the operator in the town from which it was sent, sent, and is not the identical object that she saw.

The Court: Isn't that so, Mr. Moody, that she can only refresh her memory and testify—she has either got to testify from memory, or from memoranda which she made herself?

Mr. Moody: The reason why I didn't ask her was because I did not desire that this woman should testify what was in the telegram that she saw in San Francisco—which she can testify from memory after it is shown that the telegram, or the party in whose custody it was, is now without the jurisdiction of the court—until after this telegram had been introduced in evidence; and I was only attempting at this time to present this telegram in the record for the purpose of identification

by this witness. If the court desires, I can ask her what was in that telegram.

The Court: I think you better proceed that way, from her own memory.

Mr. Moody: Q. You say this woman received a telegram in San Francisco just prior to the time that you and she left there; is that right?

A. Yes, sir.

Q. Do you remember about what date it was that she received the telegram?

A. No, sir, I couldn't tell you that, the day.

Q. Well, about how long was it before the day after Thanksgiving, the day upon which you said you left?

A. It must have been—oh, close onto three weeks.

Q. About three weeks before you left that she received this telegram?

A. Yes, sir.

Q. Do you recall at this time—do you recall whether or not Vida Rogers showed you the telegram and whether you read the telegram that she received, the first one?

A. Yes, sir.

Q. And do you recall at this time the substance of that telegram?

A. Well, perhaps not word for word.

Q. But do you recall the substance of it?

A Yes, sir.

Q. What was the substance of it?

Mr. Rush: We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid, and hearsay.

The Court: Well, on the promise of the United States attorney that they will show that the recip-

ient of the telegram is not in the jurisdiction of the court, the objection will be overruled.

By the Court: Q. Now, did this woman keep the telegram after you saw it? Was it in her possession the last time you saw it?

A. Yes, Your Honor.

Q. Well, answer the question.

Mr. Rush: We except to the ruling of the court. I understand—the court will pardon me if I inquire, in this court do we have to enter an exception to the ruling if we desire it, or does the rule that applies in the state court apply here now?

The Court: I do not think the rules apply, of the state court.

Mr. Rush: So that any time that we desire an exception to a ruling, we must enter our exception?

The Court: You can have a stipulation on that subject, if you desire it, to have an exception entered.

Mr. Rush: Will you stipulate that any time we object, we need not enter an exception, but that the exception may be presumed to have been preserved and entered, without going through the necessity in each instance?

Mr. Moody: I will so stipulate—in order to expedite the case—I will stipulate an exception may be deemed taken to all rulings.

Q. Now, will you kindly state the wording of the contents of the telegram as you remember it?

A. It was about a house with a dance-hall, kitchen and bar and five rooms in connection. Looks like a good proposition. Will finance everything. Will split fifty-fifty.

Q. Who signed the telegram, if you know; or whose name was signed to the telegram, if you know?

A. Just "Jim."

Q. Do you know anyone who is called Jim?

A. Mr. Miller, Jim Miller.

Mr. Rush: We object to that as incompetent, irrelevant and immaterial. Doubtless a great many men are called Jim.

The Court: I think that is too general, Mr. Moody. The answer will be stricken out.

Q. Before you went to Tia Juana, did Vida Rogers receive any other telegram, if you know?

A. She received one other.

Q. About how long after the first one came?

A. It must have been two weeks after the first one came.

Q. And how long before she left San Francisco?

A. Just a very few days.

Q. Did you see that telegram?

A. Yes, sir.

Q. Did you read it?

A. Yes, sir.

Q. Do you recall at this time what that telegram said?

A. Yes, sir.

Q. What did it say?

Mr. Rush: We object to that on the ground it is incompetent, irrelevant and immaterial, no proper foundation laid, not the best evidence, and calls for hearsay.

The Court: Q. Was this the last time you saw it, in the possession of this woman, Vida Rogers?

A. Yes, sir.

The Court: And you expect to show that you cannot produce the telegram, in the manner you have heretofore stated concerning the other telegram?

Mr. Moody: In the same manner, Your Honor.

The Court: The objection will be overruled.

Mr. Moody: Q. What did that telegram say, as near as you can recall at this time?

A. That everything ready. Leave Thursday or Friday, I believe it was.

Q. Do you remember by whom it was signed?

A. "Jim."

I don't think I remember this telegram as well as I do the other one; I did not see it as well. She showed me the telegram, though, but the first one, I saw it three or four different times. Vida Rogers had the second telegram after I saw it. I didn't see it more than once, that being the time I looked at it."

At the conclusion of the Government's case, on motion of the defendant, the above evidence was stricken from the record. [Tr. p. 73; Orig. Rec. p. 69.] The proceedings had at that time are here set forth in full:

"The Court: Well, now, over the objection of the defendant, a witness was permitted to testify to the contents of a telegram in the hands of Vida White in San Francisco. What do you desire to do with that for the defendant? It was admitted on certain representations made by the United States attorney, which undoubtedly were made in good faith.

Mr. Rush: We move that that testimony of the witness Louise Bordeau, concerning and referring to a telegram, which she said she saw in the hands of Vida White, or Vida Rogers, in San Francisco —that all such testimony be stricken out, on the grounds stated in the objection at the time the objection was interposed to such testimony; and on the further ground that the proper foundation

has not since been laid for the introduction of that testimony, and it has not been connected up with the defendant.

The Court: I will strike the evidence out concerning the contents of the telegram, as testified to by the witness; and I instruct you, gentlemen of the jury, that you shall consider this case without considering that testimony, and shall not consider any testimony that has been stricken out."

We do not believe it necessary to point out at length to this court wherein the admission of the evidence above set forth was erroneous.

The trial court, as shown above, admitted the testimony upon the promise and representation of the United States attorney that he would show that the recipient of the telegrams was not in the jurisdiction of the court. [Tr. p. 39; Orig. Rec. p. 41; Tr. p. 41; Orig. Rec. p. 42.]

No proof of this alleged fact was made, and again did a man's liberty hang in the balance by the slender thread of a promise unfulfilled and unkept. We cannot refrain from making critical comment on the practice which, at times, creeps into the trial of criminal cases that is best illustrated by the procedure followed in the admission of the above testimony in this case.

The testimony sought to be elicited from the witness went to the very essence and foundation of the Government's case. It was the one and only particle of evidence in the entire record from which it was possible for the jury to draw an inference that the defendant persuaded or induced Vida Rogers to go from San Francisco to Tia Juana. It therefore seems to us that

in all fairness to a defendant, who under our law can only be lawfully convicted by legal evidence convincing the jury beyond all reasonable doubt, courts should not permit testimony to be admitted over his objection, unless proper foundations are first made for its admission, or that when a prosecutor does make an unqualified promise to afterwards produce in evidence that which the court holds necessary to make the evidence competent, he should be held to strict accountability for his failure so to do. And in cases where, as here, the evidence admitted is the very gist of the case against the defendant, the latter should not be made to suffer at the hands of a prosecutor, who in his ardor and zeal to obtain a conviction makes an unqualified statement and promise, which he ought to have known, or at least should be held to have known, was impossible for him to fulfill.

Even had the Government proved that Vida Rogers was beyond the jurisdiction of the court, as an elementary matter of law, the evidence would still have been incompetent. Counsel for the defendant, in his objection to the testimony, as found on page 39 of the transcript of record, did his best to elucidate the true rule in reference to the admission of the testimony complained of, when he stated that "before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown that a telegram was sent, and before it can be proven that the telegram was sent, *it must be proven that it was sent by this defendant.*"

Every authority in the United States that we have been able to find, supports this contention, and they are

undivided in laying down the rule that before a telegram is admissible, in a criminal case, against the defendant, it must be shown that the defendant either sent it himself or authorized some one else to send it for him.

Of the textbooks on the subject, Jones in his work on Telegraph and Telephone Companies probably covers the ground more comprehensively than any other writer. In the second edition of his work, published in 1916, the author has devoted an entire chapter to telegraph communications as evidence and discusses at length what is the best evidence of the contents of a telegram, and what foundation is necessary to be laid before the admission in evidence of the contents of a telegram is proper. All of the authorities are collated in this late work and if this court is in any doubt as to what is the best evidence of the contents of a telegram, etc., we refer it to that textbook and the cases therein cited.

We here cite a few authorities upon the rule:

> "In order to admit a telegram in evidence against the sender, it must first be proved that he is the author of the telegram, and the same proof may be resorted to in this instance as that adopted for the proof of the authorship of letters."
>
> Jones on Tel. & Tel., Sec. 684.

> "The authorship of a telegram must be proved before it can be admitted in evidence," etc.
>
> *Idem.*

In the case of Chester v. State, 23 Tex. App. 577, the state was allowed to prove by one Scott the contents of a telegram sent by witness at the instance and

request of defendant, to G. M. Salinger and Bro., Leavenworth, Kansas, and, in connection with this evidence, to read a dispatch purporting to be a reply thereto from G. M. Salinger. This testimony was objected to and the court held that oral testimony is not competent to prove the contents of telegrams sent by or at the instance of an accused until the failure to produce the better evidence is satisfactorily accounted for.

> "So also, when the message is offered as a declaration by the sender in a criminal proceeding, or as an admission in a civil action the message as tendered to the company for transmission is the original and best proof."
>
> Jones on Tel. & Tel., Sec. 694, and cases cited.

> "A telegram was not admissible in evidence where there was no evidence to prove that it came from the telegraph office or who wrote it or signed it or where, when, or from whom it came, except as appeared upon the paper itself."
>
> Syllabus, Reynolds v. Hinrichs, 94 N. W. 694.

We have cited the above cases and authority for the purpose of showing the grave injustice that was done to the defendant by the admission of the above testimony. There can be no doubt that the action of the court in permitting Louise Bordeau to state to the jury what her recollection was of the contents of the purported telegram she testified was received by Vida Rogers was error. Especially damaging did this testimony become to the defendant when it further appeared in the evidence, not by the direct testimony of witnesses, but by their conclusion and opinion formed

from an examination of a document in the files of the Western Union office at San Diego that at or about the time the witness testified Vida Rogers showed her a telegram in San Francisco, somebody had telephoned a message to a clerk of the Western Union, one Hartley Shaw; that he had reduced the message to writing and as far as they knew had sent the message to San Francisco. There is absolutely no evidence in any way connecting the defendant with the telephone message to Hartley Shaw, nor does it appear that Hartley Shaw reduced to writing, correctly, what was told to him over the telephone, nor was the person who received the purported message over the wire from San Diego present to testify as to what was actually received.

The alleged message, so Louise Bordeau testified, was shown to her by Vida Rogers in the month of November, 1915. The trial of the cause was held in the month of November, 1916, one year after she had seen the alleged message. If such testimony were admissible as competent evidence, certainly the rights of a defendant, in the trial of a criminal case, who is guaranteed the right by the Constitution to be confronted with the witnesses against him and the rules of law in reference to the best evidence and the exclusion of hearsay testimony would be violated to the extent which even the direct necessities of justice should not excuse or tolerate.

THE ACTION OF THE COURT IN STRIKING THE EVIDENCE FROM THE RECORD DID NOT CURE THE ERROR IN ITS ADMISSION.

In discussing the effect of the erroneous admission of the above testimony, we approach the subject well

knowing the general rule that ordinarily where evidence is erroneously admitted, and subsequently stricken out by the court, and the jury admonished not to consider it, that the error is cured.

This rule is the one applied in ordinary cases. Yet in each of the cases expressions will be found which militate against this view in exceptional cases.

It cannot be disputed that this is one of the exceptional cases. The district attorney, in his opening statement, told the jury that the Government expected to prove that the defendant sent a telegram to Vida Rogers asking her to come down and take charge of a house of prostitution and that subsequently that he wired her again urging her to come immediately and take charge of the house. As we have said before, without proof of persuasion, inducement, or enticement on the part of the defendant the case against him must fail. The testimony of Louise Bordeau was the *only evidence whatsoever* offered by the Government and received in evidence that showed or tended in the slightest degree to show the necessary persuasion or inducement. This being so, it is clear that the defendant was convicted, not upon the legal evidence introduced at the trial of the cause, but for the sole reason that the testimony of the witness was stamped so indelibly upon the minds of the jurors that they were unable in considering the case to efface from their memory the recollection of that testimony.

The highest tribunals of our various United States have frequently been called upon to express their opinion of the effect of motions striking evidence from the record, and the admonitions of the court to disregard

the same, upon the action of jurors, where the evidence admitted was prejudicial.

We cite a few authorities from various states to show how the appellate courts have protected a defendant in a criminal action from a conviction had, where evidence was erroneously admitted to the prejudice of the accused, and with what language they have condemned the practice of permitting highly prejudicial testimony to go before the jury, upon the promise of the prosecuting officer to later produce evidence showing its competency.

> "While, at the instance of defendant, the court instructed the jury that the evidence as to defendant's arrest in the state of Texas raised no presumption as to his guilt, and that they should disregard it in making up their verdict, we are far from believing that said instruction cured the error. It has been frequently ruled by this court that an instruction to disregard evidence improperly admitted in a criminal case will not cure the error of admitting it, if it was of a character prejudicial to the defendant. State v. Mix, 15 Mo. 153; State v. Hopper, 71 Mo. 425; State v. Fredericks, 85 Mo. 145; State v. Kuehner, 93 Mo. 193, 6 S. W. 118; State v. Thomas, 99 Mo. 235, 12 S. W. 643; State v. Spivey, 191 Mo. 87, 90 S. W. 81; State v. Minor, 193 Mo. 597, 92 S. W. 466. As said in the Minor case, *supra*, 'the greatest care should be taken by court and counsel to prevent the introduction of illegal evidence, since, when it is once lodged in the minds of the jury, no one can tell its effect.' "
>
> State v. Martin, 129 S. W. 881, at page 887.

"Over the objection and exception of appellant and upon the promise of the county attorney to connect appellant therewith, the state was permitted to prove that large quantities of whiskey were delivered to persons by the names of J. Johnson, R. Jones and C. Conner. When the testimony was all introduced, counsel for appellant made a motion to exclude the same upon the ground that appellant had not been connected therewith. Whereupon the court instructed the jury as follows: 'Gentlemen, as to the evidence of the witnesses Crews, Ramsey and White, all of Crews' and Ramsey's and that portion of Wilmouth's evidence wherein he testified with reference to the receipt and delivery of whiskey and beer to C. Conner, R. Jones and J. Johnson, should be excluded, and you will not consider the same. You are also instructed that that portion of his evidence in regard to testifying to hauling five or six barrels that was taken from him and Mr. Edwards marked C. Conner, you must not consider that evidence. Also, as to the evidence of the witness Ramsey, as to the names that were on the barrels that the officers took from Edwards and Crews, and that portion of Mr. Wilmouth's testimony where he testified as to certain shipments being received at the Frisco Railroad Company's office here addressed to J. Johnson, C. Conner and R. Jones, as the state had introduced no proof to connect the defendant with these shipments.'

"This court has frequently condemned the practice of permitting the introduction of testimony without first connecting the defendant therewith, and we desire now to repeat what we said on this subject in the case of Thompson v. State, 6 Okla. Cr. 50, 117 Pac. 216, as follows: 'It is true that

at the time that this evidence was introduced the state had not offered any evidence of a conspiracy between appellant and his co-defendant, Tom Gillstrap, to kill the deceased, and the evidence was admitted upon the promise of the state to connect this testimony with the defendant. We think that this is a dangerous practice, and should not be encouraged. If the state is permitted to get incompetent evidence before a jury upon the promise of a prosecuting attorney to connect it with the defendant, and he fails to do so, impressions may be made upon the jury which it would be difficult, if not impossible, to destroy by instructions from the court that they should not consider such testimony.' In the case of Sturgis v. State, 2 Okla. Cr. 385 (102 Pac. 66), this court said: 'In the case of Devore v. Territory of Oklahoma, 2 Okla. 565, 37 Pac. 1092, it was held that such evidence might be introduced before there was any evidence of such acting together by the defendant and the persons whose acts and statements were so admitted in evidence, upon the promise of the county attorney that such acting together will subsequently be shown.' To prevent what we conceive to be questionable practice in the future, we would advise the trial courts against pursuing this course. The safe rule is to require some evidence of such acting together before the acts and declarations of others concerned in the commission of an offense are admitted in evidence, when such acts were not committed or statements were not made in the presence of the defendant. If it is made to appear to this court that incompetent and damaging testimony has been introduced against a defendant upon a promise of a prosecuting attorney to subsequently connect this testimony with the defendant,

and this connection is not made, we would feel strongly inclined to reverse a conviction upon the ground that the jury may have been influenced by such improper testimony, notwithstanding the instruction of the court that they should not consider it. We know that promises to connect testimony are often made in good faith when through overzeal counsel may be mistaken as to the effect of the testimony by which they expect to make this connection. Upon the other hand, it gives attorneys who are indifferent as to the means by which they get a verdict an opportunity to inflict irreparable injury upon their opponents. If trial courts will persist in allowing testimony to be prematurely introduced upon the ground that the competency of such testimony will be made to appear, they do so at their peril. If the competency of the testimony is subsequently made to appear, the error will be immaterial and harmless; but, if this is not done and the testimony is material and damaging to a defendant, we doubt if any instructions by a trial court could do away with the injury which has been done to a defendant by such testimony, and a new trial should be granted."

Tucker v. State, 132 Pac. 689, at page 690.

"The state introduced evidence regarding the theft of another horse. Upon objection by defendant, it was proposed by the district attorney to connect the same. But this was not done. The evidence was afterwards stricken out. The bill shows that in the trial of another case, the district attorney as well as the court became familiar with the facts connected with said horse, and knew that the state would not be able to connect

appellant with theft of this other horse. As presented, we think this testimony should not have been admitted, and under the circumstance the error was not entirely cured by withdrawing said testimony."

Tijerina v. State, 74 S. W. 913.

"In cases where improper prejudicial evidence has been permitted to go to the jury upon a wrong theory, or under a mistake of the court as to the law, * * * and the evidence thus introduced is of a character to prejudice the jurors against the defendant, and to make a fixed impression upon the mind, and it is not reasonably probable that the verdict would have been the same had this illegal evidence not been introduced, we think a new trial should be granted. See, also, Barth v. State, 39 Tex. Cr. R. 381, 46 S. W. 228, 73 Am. St. Rep. 935; Bullock v. State, 65 N. J. Law 557, 47 Atl. 62, 86 Am. St. Rep. 668; State v. Finch, 71 Kan. 793, 81 Pac. 494; Dysart v. State, 46 Tex. Cr. R. 52, 79 S. W. 534; People v. Rodriguez, 134 Cal. 140, 66 Pac. 174; Davis v. State, 85 Miss. 416, 37 South. 1018; State v. Bateman, 198 Mo. 212, 94 S. W. 843; State v. De Masters, 15 S. D. 581, 90 N. W. 852."

State v. Rees, 107 Pac. 893.

The above case cites with approval the case of Drury v. Territory, 60 Pac. 101, in which case in a well considered opinion the Supreme Court of Oklahoma discusses at length the points above referred to.

"It is insisted that the foregoing error of the court was cured when the witness Hilton took the stand and gave to the jury substantially the same statements and confessions he had prior to that

time made to the officers. We cannot say that the jury attached no importance to these statements of Hilton made shortly after the commission of the crime, not that the verdict would have been the same if they had been rejected by the court. It is further insisted that the error of the court was cured by the following instruction given to the jury: 'I charge you that no statements, or admissions, or confessions (other than his own sworn testimony in court), made by the alleged accomplice, Hilton, after the commission of the offense charged, and not in the presence of the defendant, should be considered by you as evidence in this case against this defendant, as tending to connect him with the offense.' Judges are not justified by the law in admitting evidence before the jury under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not be considered by them in making up their verdict. Such a course, if practiced, certainly would be out of the ordinary, and not just to a defendant."

People v. Oldham, 111 Cal. 648, page 653.

"There are cases where an erroneous ruling of the court in admitting evidence cannot be cured by a subsequent reversal by the court of its own actions. In those cases the incompetent matters have gone to the jury, and the injury is beyond repair. Instructions of the judge to disregard such evidence are in such cases no adequate remedy for the wrong done."

People v. Wong Chuey, 117 Cal. 624, page 631.

"Where a defendant, accused of crime, testified only as to his present residence, out of the county

of the venue, he cannot properly be cross-examined as to his residence in the county at a time long prior to the date of the offense charged; and his answers to collateral and irrelevant questions about such prior residence are conclusive, and cannot be contradicted for the purpose of impeachment. The admission of the testimony of the sheriff in contradiction of the defendant, that he was at such prior date in the county, at the county jail, was prejudicially erroneous, and the error was not cured by striking out the allusion to the county jail." (Syllabus.)

People v. Rodriguez, 134 Cal. 140.

"The rulings of the court in allowing the district attorney to make such statements and charges against the defendant in the form of questions were clearly erroneous and tendered to injure the defendant seriously. The final ruling of the court was right, and such reversal of the former rulings was made as clear and comprehensive as it was possible to make it. As a matter of law the statements and charges were not longer a part of the record. The previous erroneous rulings were theoretically cured, and the statements and charges eliminated from the minds of the jury. Whether in practical result it is possible to remove from the minds of jurymen the effect of such detailed statements and charges when so deliberately received and repeated in their hearing may well be doubted. If the dramatic recounting of the alleged acts and sayings of the defendant was calculated to effect the jury in determining the guilt or innocence of the defendant notwithstanding that they were at least in form removed from its considera-

tion, we have the power and it is our duty to give the defendant a new trial for that reason."

People v. Conrow, 93 N. E. 943, page 948.

In our investigations of the authorities holding that the erroneous admission of prejudicial evidence over the objection of the defendant is not cured except in ordinary cases by the subsequent action of the court in striking the same from the record and admonishing the jury not to consider same in their deliberations on the verdict, we have not been able to find a case where the record showed that the substantial rights of the defendant had been prejudiced that the court did not unhesitatingly set the verdict aside.

Many, many more authorities on this proposition could be cited from the various appellate courts throughout the country to the same effect, but inasmuch as the rule of law seems to be well established we will content ourselves with citing but one more case. This case was decided by the Circuit Court of Appeals of the Fifth Circuit on October 4th, 1915, and seems to be the latest decision of any of the United States courts that bears upon the subject at hand. It is the case of Latham v. United States, 226 Fed. Rep. 420. The defendant was convicted for devising a fraudulent scheme for obtaining money, etc., by means of the post-office. In argument the defendant's counsel commented upon the fact that only one witness had been produced to show that any money had been received, etc., a proper comment (as the court says) on his part. The district attorney in closing the case for the Government, made the statement that, had the train not been

three hours late he would have had another witness, who would have testified that he also had been defrauded. The defendant's counsel immediately objected, and the objection was sustained by the court and the jury properly cautioned not to consider said statement of counsel.

The court in discussing the remarks of the district attorney uses the following language, which we respectfully submit, in view of the circumstances in the case at bar and the fact that the objectionable testimony was the only evidence offered which tended to show any persuasion on the part of defendant, applies with great force to our contention:

> "The almost unbroken line of authorities hold that it is to the action of the court upon the objection to which error may be assigned; that, if the court stops counsel and cautions the jury this cures the violation of the defendant's right to a trial and verdict on the testimony of witnesses, and not statements of counsel not based on testimony. And in ordinary cases this is the correct rule. Yet in each of the cases expressions will be found which militate against this view in exceptional cases.
>
> "Every one must realize that there are exceptional cases where, although the court does stop counsel and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression, it still enters into and forms a part of the verdict. In such cases the trial court should set aside the verdict on motion for a new trial. The language of Justice Fowler, in Tucker v. Henniker, 41 N. H. 325, is pertinent, and applies with great force to criminal prosecutions:

"'Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. * * * It is unreasonable to believe the jury will utterly disregard them. They may struggle to disregard them. They may think they have done so, and still be led involuntarily to shape their verdict under their influence. * * *'

"* * * While the fact that anyone was actually defrauded may not have been material, yet the fact that people may have been defrauded by the scheme would, necessarily, have had great weight with a jury in arriving at their conclusion that a scheme had been formed with intent to defraud. It seems to me impossible to say that the remarks of the district attorney were not prejudicial to the defendant's right to a verdict on the testimony of witnesses."

In the case at bar the testimony of Louise Bordeau of what her recollection was of the wording of the contents of the telegram to the effect that it was "about a house with a dance hall, kitchen and bar and five rooms in connection. Looks like a good proposition. Will finance everything. Will split fifty-fifty," and "That everything ready. Leave Thursday or Friday," and both telegrams signed by "Jim," would certainly be very much more prejudicial to the rights of the defendant and particularly the right to have introduced against him the best evidence, than the statement of the district attorney in the case above quoted.

We submit in conclusion that the action of the court in instructing the jury in this case to disregard the prejudicial and damaging testimony of Louise Bordeau did not in fact cure the error of the court in permitting her to testify. The injury was too deeply fixed in the minds of the jurors to be eradicated, and as said in the case of Drury v. Territory, 60 Pac. 101:

> "In cases where improper prejudicial evidence has been permitted to go to the jury upon a wrong theory, or under a mistake of the court as to the law, or upon the contention by the prosecution that it will later be made competent by proof of other facts, which are not proven, and the evidence thus introduced is of a character to prejudice the jurors against the defendant, and to make a fixed impression on the minds, and it is not reasonably probable that the verdict would have been the same had this illegal evidence not been introduced,"

a judgment of conviction should not be sustained and that this court in all fairness to this defendant should unhesitatingly set aside the verdict.

POINT THREE,

The Court Erred in Overruling the Objections of the Defendant to the Admission of U. S. Exhibits III and IV.

The plaintiff in error did not assign the above point as an error in his assignment of errors, but inasmuch as the documents admitted relate to certain telegrams alleged to have been sent by the defendant, the matter becomes exceedingly important when considered with

the admission of the testimony of Louise Bordeau in reference to the contents of the telegrams received by Vida Rogers, and we therefore respectfully request this Honorable Court to review the matter here complained of, under the rule of this court that it may, at its option, notice a plain error not assigned.

The witness F. A. Bennett, manager of the Western Union Telegraph Company in San Diego, after testifying that the defendant had opened a charge account with the company on May 24, 1915 [see U. S. Exhibit No. 1 and Tr. pp. 53-54], was shown a purported telegram [Tr. p. 55] which he testified had been telephoned in to the office in San Diego by somebody to be sent [Tr. p. 55] and that the telephone message had been received by an employee of the company, one Hartley Shaw, who was the person that wrote out what was in the record of the receipt of the telegram. [Tr. p. 62.]

The purported telegram was marked U. S. Exhibit No. 2 for Identification, and the witness was then shown a bill which he testified was a copy of a bill rendered the defendant for the month of November, 1915. This bill was marked U. S. Exhibit No. 3 for Identification. Another document, testified to by the witness as being a "daily cash record," was marked U. S. Exhibit No. 4 for Identification. The witness then testified that the documents marked for identification were regular routine records of the Western Union office in San Diego, but that he did not make up the records himself and that "all I know about it is simply what I find in the records. Personally I didn't have anything to do with it. As far as I know the records are ac-

curate; there is a slight chance that they may not be." [Tr. p. 58.]

The bill and daily cash receipts marked as aforesaid respectively, U. S. Exhibits III and IV, were then offered in evidence by the Government [see Tr. bottom of p. 57], received by the court over the objection of the defendant that each of them was "incompetent, irrelevant and immaterial and not the best evidence and hearsay" [Tr. p. 58], and marked U. S. Exhibits III and IV. [See Tr. pp. 60-61.]

After the admission of the documents, as shown by the minutes of trial on November 21, 1916 [Tr. p. 23], there was considerable argument as to the admissibility of the evidence, and finally the jury was recalled into court and the case continued until the next day.

On the next day the Government called as a witness one Myrl Stetzel, a clerk of the Western Union Company in San Diego in the month of November, 1915. She testified that U. S. Exhibit No. III was a carbon copy of a bill for telegrams for the month of November and that the original thereof was addressed and mailed to J. B. Miller, Victoria Apartments. That *she made the bill out from the telegrams on file in the office;* that the document does not show what year it was made out and that the date was on the original bill, but not copied on the copy. [Tr. p. 63.] That the carbon copy of the bill is simply a copy of that part of the bill that she wrote and rendered, and that there was other printed matter on the bill that was rendered that does not appear on the carbon copy (U. S. Exhibit 3) and that the bill rendered had a date on it and U. S. Exhibit No. III does not. That when she went to make

up the bill, she made it up from what purported to be a telegram which was taken over the telephone, and which purported telegram she did not know how got into the office, or who wrote it, or where it came from. That she just found it among the files in the office, and following her usual course of business made the bill (U. S. Exhibit 3) from the information that was contained on the purported telegram. [Tr. p. 65.]

That *she had no personal information from any source whatsoever as to the amount of the charge, or when it was made or anything else, except what she got from the telegram she found in the office, which telegram, according to the rules of the office, indicates that it was telephoned into the office. Also that the telegram was in the handwriting of one Hartley Shaw.* [Tr. p. 66.]

Etta Naylor, cashier of the Western Union Company in San Diego in November, 1915, was then called and shown U. S. Exhibit No. 4, which she testified was the cash register for December 9th and was in her handwriting. The following question was then asked by the United States attorney:

> "Q. I will show you a carbon copy of a bill which has been introduced in evidence as United States Exhibit No. 3 and ask you if you can show from the Exhibit No. 4 whether or not the Exhibit No. 3, the bill, has been paid?"

To which question plaintiff in error objected on the grounds that it was "incompetent, irrelevant and immaterial, and asking for a conclusion of the witness."

The objection was overruled and the witness an-

swered "Yes, sir, that is my handwriting, and *it pays this bill.*" [Tr. pp. 67-68.]

On cross-examination [Tr. pp. 68-69] she testified as follows:

> "I have no independent recollection of the payment of that bill. All that I know about it is that I find it in the record kept by me, and the record shows it was paid. I assume that the $2.53 is the amount of the bill for the month before, because it is the same amount. If another individual, or the same individual, paid the same amount for some other purpose, it would appear on my cash just the same. I do not know who paid that bill, and I have no knowledge of how it was paid. I haven't any idea whether it was paid in cash or by check, or by what individual. I don't know how the bill went out to the person who paid it, if it ever did go out, because I don't handle that part of the work. All I know is what the record shows, and the record shows that on December 9th J. B. Miller is credited with cash, $2.53."

From the above testimony it is seen that the bill for telegrams for the month of November issued to J. B. Miller (U. S. Exhibit No. 3) was made up by the clerk, in the ordinary routine of the office business, from what purports to be a telegram which somebody communicated over the telephone to Hartley Shaw, a clerk in the office of the Western Union Company, who reduced the purported message to writing. There was no evidence offered as to who telephoned the message to the Western Union office, nor does it appear what the contents of the purported telegram was, or that it was, in any way, connected with the defendant.

The purported telegram so received over the telephone was not admitted in evidence, and we submit that not only was there no foundation laid for the admission of U. S. Exhibit No. 3, but that its admission in evidence was incompetent, irrelevant and immaterial for any purpose. When taken into consideration with the prejudicial testimony of Louise Bordeau, U. S. Exhibit No. 3 certainly was extremely prejudicial to the defendant's rights to be tried by legal evidence.

And this likewise applies to U. S. Exhibit No. 4. The witness who prepared this document was permitted to state her conclusion that U. S. Exhibit No. 3, the bill, had been paid, when it is shown by her cross-examination that all she knew about its alleged payment was that the record showed its payment, and that she personally did "not know who paid that bill," or "how it was paid," or whether it was paid by cash, or by check, or by what individual, and that all that she did know concerning the matter was that U. S. Exhibit No. 4 shows that on December 9 J. B. Miller was credited with cash $2.53, and that she assumed that the $2.53 was the amount of the bill for the month of November, for the sole and only reason that it was the "same amount" as the amount appearing on U. S. Exhibit No. 3.

We insist that the action of the court in permitting Etta Naylor to state her conclusion as to whether or not U. S. Exhibit No. 3 had been paid is too clearly erroneous for any extended discussion or citation of authorities. The testimony of the witnesses as shown by the transcript, and as set forth in substance above, shows clearly that it was not the best evidence of the

payment of any bill but merely a conclusion of the witness, the effect of stating such conclusion being but to further impress upon the minds of the jury the testimony of Louise Bordeau in reference to the telegrams.

Absolutely no evidence stands in the record connecting, or even tending to connect, the defendant with any bill for telegrams issued to J. B. Miller for the month of November, nor is there any evidence that J. B. Miller paid any bill for telegrams issued in that month. We see no way that these exhibits could properly be introduced without in some manner connecting them with the defendant, or by some proof first shown that the telegrams were sent; that they were sent by the defendant in this case; that their contents was material and relevant to issues here involved and that they had been paid for by the defendant or by someone else with his knowledge.

We insist that their admission violated each and every ground of our objection to their introduction and that they were incompetent, irrelevant and immaterial, not the best evidence and hearsay.

POINT FOUR.

The Court Erred in Denying Defendant's Motion to Instruct the Jury to Find a Verdict of Not Guilty, on the Ground of the Insufficiency of the Evidence to Sustain a Conviction.

POINT FIVE.

The Court Erred in Rendering Judgment Against the Defendant for the Reasons Set Forth in Paragraphs VI, VII, VIII and IX of the Assignments of Error. (Tr. pp. 102-103.)

The above errors are all based upon the insufficiency of the evidence to sustain the conviction of the defendant by the jury, and will therefore be discussed together.

In presenting this particular matter, plaintiff is not unmindful of the rule that if there is any evidence whatsoever to sustain the verdict, this court will not disturb the verdict of the jury. But plaintiff in error proposes to show by a resume of all the evidence introduced that this is one case where a reading of the record will not only convince one of the strength of the point raised, but will show conclusively that the jury was led to convict the defendant by reason of the erroneous admission of the prejudicial evidence hereinbefore discussed.

It must not be forgotten in discussing the actual evidence standing in the record that the court struck out all of the testimony of the witness Louise Bordeau in reference to the contents of the telegrams.

Also it must be kept in mind that to sustain the conviction there must be some evidence of the following elements of the offense:

1st. That the defendant persuaded, induced or enticed Vida Rogers to go from San Francisco to Tia Juana.

2nd. That he intended that, and his purpose in so persuading her, etc., was that she should and would, when and after she reached Tia Juana, personally engage in prostitution, debauchery, or some other immoral practice of the same sort or kind.

With these considerations in mind, let us examine the testimony of the witnesses against the defendant.

The witness, Louise Bordeau, testified in substance that she was a prostitute following, in the month of July, 1915, her vocation in a house of prostitution at No. 43 Washington alley, in the city of San Francisco, conducted by Vida Rogers. [Tr. p. 36.] That she first met the defendant in the summer time, when she was working in the house of prostitution. That Vida Rogers introduced him to her; that she only saw him there perhaps three or four times in all the time she was working at Washington alley. That the next place she saw the defendant was in Tia Juana. [Tr. p. 43.] That on the first day after Thanksgiving, 1915, she, in company with Vida Rogers, left San Francisco and went by train to San Diego.

That when she reached Tia Juana she engaged in prostitution in the "Palace," the house of prostitution run by Vida Rogers, the landlady. That when the

house was first new she saw the defendant there quite often. That Vida Rogers was required to get a license to run the house, which license was issued by the Mexican Government. That on the day she arrived in San Diego with Vida Rogers the defendant was at the train and talked with Vida Rogers a few minutes and that some short time later she saw Vida Rogers get into a stage that had a sign on it that said "To Tia Juana, Mexico." [Tr. p. 69.]

Dave Gershon testified that he had been in Tia Juana about ten days or two weeks ago and saw Vida Rogers at that place; the balance of his testimony being contradictory statements as to whether he did or did not have a subpoena to serve on her.

Ernest Estudillo testified that he resided in Tia Juana in November, 1915; that he knew a place in Tia Juana called the "Palace," which was a house of prostitution; that he knew the landlady, whose name was Vida; that he was sent by the subprefecto of Tia Juana down to the Palace to work there as a policeman and that he saw the defendant there a good many times; that the defendant gave an order to one Tony to pay him his wages and that Tony, who appeared to be the manager, paid him for his services.

Charles H. Cousins testified that he was a carpenter and built the "Palace" in Tia Juana; that the defendant authorized him, hired him and paid him for building it.

H. M. Stanley, a police officer in San Diego, testified that he knew the "Palace" and that it was a house of prostitution. Also that he knew the defendant, with whom he had a conversation in which the defendant, in answer to a question asked him by the witness, said: "I will see my landlady and she may give you this information"; also that the defendant said, when cautioned by the witness in reference to the "Palace": "Well, I am in the clear; I don't run it but my landlady runs it for me."

Julian Cliff testified that in November, 1915, he was manager of the Victoria Apartments in San Diego and that the defendant occupied an apartment at that place at that time. That the defendant had the house system telephone in his apartment, which was connected up with the exchange; that the special connection was made either at Mr. or Mrs. Miller's request. That the office 'phone of the Victoria Apartments was Main 3857 and the number of the 'phone in the defendant's apartment was Main 6626.

Arthur Mosedale testified that he was employed by the telephone company in San Diego and on October 11, 1915, installed a telephone in the defendant's apartment at the Victoria Apartments, the number of which was Main 6626.

F. A. Bennett, Etta Naylor and Myrl Stetzel testified that they were employed by the Western Union Telegraph Company at San Diego and gave explanatory testimony concerning United States Exhibits I, III and IV. In substance their testimony was to the ef-

fect that the records were true and correct to the best of their knowledge and that U. S. Exhibits III and IV were taken from and made up from certain telegrams which were marked for identification, but which the court refused after objections to admit in evidence. The testimony of these witnesses is more fully discussed in detail under the point raised as to the error of the court in admitting in evidence United States Exhibits I, III and IV and is, therefore, in order to avoid repetition, not set forth here.

An examination of the transcript will show that the substance of the testimony of all the witnesses in the case is, upon all salient points, hereinabove set forth in full.

If there is one single shred or particle of evidence in this case which can, by the strongest stretch of the imagination, be gleaned from the record that points to any persuasion, or inducement, or enticement, on the part of the defendant, of Vida Rogers to go from San Francisco to Tia Juana, we would certainly be most pleased if the United States attorney will point it out to us in the brief he files herein.

And likewise, if there is a single, solitary shred of evidence in this record that the defendant had the intent and purpose that Vida Rogers should engage in the prastice of prostitution, or debauchery, or manage a house of prostitution, in Tia Juana, or elsewhere, it would be gratifying to us to know where that evidence can be found.

In the case of Welsch v. United States, 220 Fed. 269, it is said:

> "Undoubtedly, the gist of the alleged offense is the intention which underlies words and acts and gives them significance."

See also decision in Johnson v. U. S., 215 Fed. 679-683.

And in the Athanasaw case the Supreme Court of the United States approved the instructions of the trial court to the jury that:

> "The intent and purpose of the defendant at the time * * * is the very gist and question of this case."

The late case of Gillette v. United States, 236 Fed. 215, in holding that the evidence was insufficient to warrant a conviction, uses this language:

> "When the girl arrived in Moorehead (it was proven in this case that Gillette had persuaded her to go), the offense with which Gillette was charged was complete, *providing the requisite intent and purpose* was behind the journey. * * * His intent and purpose, of course, must be found from his acts, declarations and conduct. There is no evidence to show that Gillette, *at the time* he asked the girl to come to Moorehead, had the intent and purpose that the girl should engage in the practice of debauchery and illicit sexual intercourse, and hence the charge made by the indictment was not proven. Taking these facts into consideration, we are of the opinion that there is not substantial evidence to sustain the conviction."

There can be no doubt that the defendant built a building in Tia Juana, and that the place was used as a house of prostitution, but there is no evidence that

the defendant ran it, or that he owned it, or participated in any way in its profits. But assuming that he did own it, would it be unlawful to permit prostitution to be carried on in it in a country where that business is recognized by the law as a legitimate business and licensed as such?

Louise Bordeau testified that the license to run the house was procured by Vida Rogers; that she also was licensed to sell liquors and tobacco, but the charge in this case is not that the defendant had built a house in Tia Juana which was conducted by Vida Rogers as a house of prostitution, but that the defendant persuaded and induced Vida Rogers to come from San Francisco to Tia Juana for the immoral purpose of managing the house.

Where is the evidence showing that the defendant persuaded her to come?

There is not a witness in the case who testified concerning any persuasion or inducement on the part of the defendant. The witness Louise Bordeau had seen the defendant only on three or four occasions before she left San Francisco, in November, 1915, and these occasions were months prior to Thanksgiving day in November, 1915. She does not even testify as to having had a single conversation with him, either in San Francisco, Tia Juana or elsewhere. After meeting him in San Francisco in July, 1915, she testifies, as shown on page 43 of the transcript, that "The next place I saw the defendant was in Tia Juana." Later on, as the last witness to testify, she was recalled and stated that when she and Vida Rogers arrived in San Diego the defendant was at the train for a very few minutes.

She could not recall any conversation held there by the defendant, and said in reference thereto, "It was just 'hello'; that is all I know." In view of her previous testimony that she never saw the defendant from the time she had met him months ago in San Francisco, until she saw him in Tia Juana, we cannot, in view of her lack of information concerning what happened at the depot in San Diego, believe that she told the truth in regard to seeing the defendant there at that time. But whether she did or not, it is immaterial and is only mentioned here for the purpose of showing what little reliance can be placed upon her testimony.

Further comment on the testimony of the witnesses Cliff, Gershon, Cousins, Mosedale, Naylor, Stetzel and Bennett is unnecessary and would be trifling. Nothing in what they said goes to the support of any of the elements of the offense charged.

Nor can the Government obtain any solace or comfort from the testimony of the witnesses Estudillo and Stanley. The former merely testified that he was a policeman, sent down to the house by the subprefecto of Tia Juana, and was paid for his services by one Tony, who was the bartender and appeared to be the manager. Also, that Mr. Miller gave an order to Tony to pay him; and Stanley testified that he had a conversation with the defendant, wherein he stated that his landlady ran the house for him.

But again, we must remember that the defendant was not tried for building a house which he may or may not have owned, or which may or may not have been leased to a person who was running it as a house of prostitution.

We respectfully submit that an entire reading of the record will fail to disclose any evidence whatsoever tending to show that the defendant either persuaded, induced or enticed Vida Rogers to go from San Francisco to Tia Juana, or that he had any intention whatsoever that she would engage in the practice of prostitution or debauchery, or any other immoral practice within the meaning and purview of section 3 of the statute.

POINT SIX.

Instructions.

The court erred in instructing the jury as follows:

"You are instructed that before you can convict the defendant in this case, the proof must satisfy you beyond a reasonable doubt of the following facts:

First. That the defendant did knowingly, unlawfully and wilfully persuade, induce or entice Vida White, alias Vida Rogers, to go from the city of San Francisco, California, or other place in the state of California, to the town of Tia Juana, Mexico;

Second. That in so going, the said Vida White, alias Vida Rogers, went upon the line or route of the Southern Pacific Railroad Company, a common carrier from the city of San Francisco, in the course of her journey, and that she went by automobile stage, a common carrier from the city of San Diego, California, to the town of Tia Juana, Mexico, and not otherwise.

It is not necessary, I charge you, for the Government to show that she went all the way from

the city of San Francisco to the city of San Diego on the Southern Pacific Railroad. The important thing in this connection is that she traveled by a common carrier, engaged in foreign commerce on her route, after she had been persuaded, induced or enticed, as aforesaid.

Third. That at the time the defendant so persuaded, induced or enticed said Vida White, alias Vida Rogers, to go to Tia Juana, Mexico, from the state of California, it was for the purpose of prostitution, debauchery, or some other immoral purpose of the same sort and kind, and that the defendant intended that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the republic of Mexico, personally engage in prostitution, debauchery, or some other immoral practice of the same sort and kind. And I instruct you in this connection that if the said Vida White, alias Vida Rogers, was placed by the defendant in a house of prostitution in the town of Tia Juana, for the purpose of having her remain therein, and for the purpose of having her manage a house of prostitution as landlady or superintendent, that that is an immoral purpose within the meaning of the law. It is not necessary for the Government to prove that the defendant paid any part of the expenses of the said Vida White, alias Vida Rogers, in going to said Tia Juana, Mexico." [Tr. pp. 75-76.]

The third subdivision of the above instruction, we contend, is erroneous. In one breath the court charges that before the defendant can be convicted, the jury must be satisfied that the defendant "intended that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the republic

of Mexico, *personally engage* in prostitution, debauchery, or some other purpose of the same sort and kind," and in the next breath charges that "if the said Vida White, alias Vida Rogers, was placed by the defendant in a house of prostitution in the city of Tia Juana, Mexico, for the purpose of having her remain therein, for the purpose of having her manage a house of prostitution, as landlady or superintendent thereon, that *that is an immoral purpose within the meaning of the law.*"

By this instruction the jury are told that the practice of personally engaging in the business of managing a house of prostitution, as landlady or superintendent, regardless of whether or not the landlady or superintendent prostitutes or debauches her own body, or permits others to do so, is an immoral practice of the same sort and kind as prostitution and debauchery. With this we cannot agree. There can be no doubt that the purpose of having Vida Rogers manage a house of prostitution would be an immoral purpose, but, as contended on our argument on the demurrer to the indictment, the only immoral purpose or practice that is contemplated by the words, "other immoral purpose" and "other immoral practice," is one which is of the same sort or kind as debauchery and prostitution.

As further shown by the argument under point one, *supra,* the courts have held that "prostitution" means that the woman is "to offer her body to indiscriminate sexual intercourse with men, either for hire, or without hire." (Suslak v. United States, 213 Fed. 914); and that "debauchery" is "used in the statute with refer-

ence to immoral sexual relations." (Gillette v. United States, 236 Fed. 215.)

In every case which has been decided, the transportation of the woman has been for the sole purpose of personal prostitution, or personal debauchery. In no case has it been decided that transportation for the purpose of having women commit acts which might eventually lead or tend to their moral degeneracy is sufficient to justify prosecution under the act.

We submit, that the argument and authorities cited in the points raised under point one herein are directly applicable, and apply with great force to the proposition raised here, and we respectfully request the court to again read that portion of this brief, keeping in mind the parts of the instruction quoted above, and which we here complain of.

We also allege, that in lieu of the last paragraph of the above instruction given to the jury, the court should have instructed as we requested in our instruction No. 21, which was refused. This instruction was framed in accordance with the holding of the court in the Athanasaw case (227 U. S. 326), in reference to what proof was necessary to convict under an indictment charging a purpose of debauchery. It is as follows:

> "It is not sufficient to warrant a conviction of the defendant that he intended that Vida White, alias Vida Rogers, should, after she reached Tia Juana, in the republic of Mexico, act as landlady or housekeeper in a house of prostitution, or manage or operate such a house, unless it was the intention of the defendant that said Vida White, alias Vida Rogers, should, as a result of leading such a life, eventually give herself up to a

condition of debauchery which would eventually lead to a course of sexual immorality on her part."

There are other general instructions requested by the defendant, and refused by the court, which instructions are set forth in the assignment of errors, and which we are of the opinion should have been given to the jury by the court, but owing to the length of this brief, and our confidence in the merits of the points we have already raised herein, we will confine ourselves to but one more instruction, the giving of which we are convinced was a serious error.

The jury, after receiving their instructions from the court, retired to deliberate at 2:20 o'clock p. m. They returned into court at 4:40 p. m., when the following proceedings [Tr. p. 81] were had:

"The Court: I have a note, presented to me by the bailiff in charge of the jury, reading as follows:

'Can the jury construe a mutual agreement to be persuasion or inducement? L. J. Bradford, foreman.'

Do you desire an instruction on that subject, gentlemen.

The Foreman: We do.

The Court: The statute, as I read it to you, reads that 'Any person who shall knowingly, persuade, induce, entice or coerce, or cause to be persuaded, induced, enticed or coerced, or aid or assist in persuading, inducing, enticing or coercing any woman,' and so forth.

It is entirely proper for me to instruct you on the subject on which you inquire.

Now, according to the Standard Dictionary, one of the definitions of the words 'induce' is 'to lead in, to introduce. Second, to draw on, to over-

spread. Third, to lead on, to influence, to prevail on, to incite, to move by persuasion or influence. Fourth, to bring on, to effect, a cause; as a fever induced by fatigue or exposure.' The synonyms of this word are: 'To move, instigate, urge, impel, incite, press, influence, actuate.'

The word 'persuade' means: 'To influence or gain over by argument, advice, entreaty, expostulation; to draw or incline to a determination by presenting sufficient motives. Second, to try to influence. Third, to convince by argument or by reasons offered or suggested from reflection; to cause to believe. Fourth, to inculcate by argument or expostulation, to advise, to recommend.' Synonyms: 'To convince, induce, prevail on, win over, allure, entice.'

Now in the Law Dictionary, the word 'inducement' in contracts is 'That the benefit or advantage which the promissor is to receive from the contract is the inducement to make it.'

In criminal evidence it is 'The motive which leads or tempts to the commission of crime.'

Now, with those definitions in mind concerning these words, I instruct you that a consideration for entering into an agreement is an inducement to enter into the agreement. I think probably you understand the situation now."

The jury again retired at 5:00 o'clock p. m. [Tr. p. 83], and returned again into court a few minutes later; to be exact, at or about 5:02 o'clock p. m. [Tr. p. 28], and presented their verdict. Through mistake and inadvertance of counsel, an exception was not at the time reserved to the giving of the above instruction, but it was later granted by the court [see minutes of trial, Tr.

p. 31], and while it may be perhaps irregular, yet, in view of the quick return of the jury with its verdict after the instruction was given to them, we ask this court to review same.

It is apparent from the note presented to the court by the foreman of the jury that the jury had decided in their own minds that Vida Rogers and defendant had a mutual agreement concerning the running of the "Palace" in Tia Juana. The record and transcript fails to show any testimony from which the jury could draw this inference and inasmuch as there was absolutely no evidence showing any agreement, or even in the slightest degree tending to show any agreement, between Vida Rogers and the defendant, we are at a loss to find upon what basis or theory the court instructed it "that a consideration for entering into an agreement is an inducement to enter into the agreement."

Even if there was any evidence tending to show that there was an agreement between the defendant and Vida Rogers there is no evidence showing, or tending to show, that it was made prior to the time Vida Rogers left San Francisco and arrived in Tia Juana, or that it was made within the United States.

The evidence shows that Vida Rogers was a woman between 35 and 40 years of age. [Tr. p. 46.] It is also shown that in the month of November, 1915, she was engaged in conducting a house of prostitution as landlady thereof in the city of San Francisco and no doubt, Vida Rogers, had been engaged in this nefarious practice for a good many years. True, the evidence shows that Vida Rogers conducted a house of prostitu-

tion in the city of Tia Juana in a building which was built by defendant the next month after Vida Rogers arrived in Tia Juana, and if this was evidence of any agreement (which in our opinion is not), yet, there is no evidence showing or tending to show that the agreement was even started or consumated within the boundaries of the United States. It is quite possible that Vida Rogers, seeking a more lucrative field, for her activities, than San Francisco went voluntarily to Tia Juana, where gambling and horse racing was rife, and there made an agreement freely and voluntarily and of her own accord with the party who owned the "Palace" at that time (the evidence fails to disclose who the party was) to conduct that place in any manner or for any purpose that she saw fit. Nor is there any evidence to show that any of the acts of Vida Rogers were not done upon her own volition, or that her journey was not first conceived in her own mind and executed of her own accord. Certainly, there is no evidence that the defendant had anything to do with what she did, nor is there any evidence to show that he even had knowledge of what she was going to do. Granting for the sake of argument that Vida Rogers went from San Francisco to Tia Juana and there met the defendant, with whom she made an agreement in reference to the leasing of the building built by the defendant for conducting it as a house of prostitution, yet, unless it was shown that the defendant induced or persuaded her to come from San Francisco to Tia Juana for an immoral purpose there could be no violation of the law.

Furthermore, the term inducement, or more properly the word "induce" used in the statute, refers to an

intent on the part of a person to instigate, urge, impel or influence a girl or woman to go "from one place to another in interstate or foreign commerce," and is in no wise connected with a "consideration for entering into an agreement" as used in the language of the court in the above instruction.

The question asked by the jury in the note it presented to the court was whether or not the jury could construe a mutual agreement to be persuasion or inducement and the court instructed the jury, not upon the subject of which they inquired, but did instruct it, "that a consideration for entering into an agreement is an inducement to enter into the agreement."

We will be pleased to have the United States attorney point out to us in his brief what the inducement in reference to the consideration in an agreement has to do with the inducement or persuasion on the part of a person in causing a woman to go from one place to another in foreign commerce.

We most earnestly contend that the errors and omissions occurring at the trial of this cause, and pointed out to the court in this brief, should be corrected by this Honorable Court, and that the verdict of the jury in this cause should be set aside.

Respectfully submitted,

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